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11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**

13 ANTHONY SESSA; and MARK SESSA, on  
14 behalf of themselves and all others similarly  
15 situated,

16 Plaintiffs,

17 v.

18 ANCESTRY.COM OPERATIONS INC., a  
19 Virginia Corporation; ANCESTRY.COM  
20 INC., a Delaware Corporation; and  
21 ANCESTRY.COM LLC, a Delaware Limited  
22 Liability Company,

23 Defendants.

Case No. 2:20-cv-02292-GMN-BNW

**PLAINTIFFS' MOTION TO COMPEL  
DEFENDANTS' RESPONSE TO  
INTERROGATORY NO. 12 AND  
MEMORANDUM IN SUPPORT**

Complaint filed: December 17, 2020

Hon. Judge Gloria M. Navarro

1 Plaintiffs, Anthony Sessa and Mark Sessa, move to compel Defendants, Ancestry.com  
 2 Operations, Inc., Ancestry.com, Inc., and Ancestry.com LLC (together, “Ancestry”) to provide a  
 3 complete answer to Interrogatory No. 12 issued to Ancestry by Plaintiffs pursuant to Fed. R. Civ.  
 4 P. 37. In accordance with Local Rule 26-6, Plaintiffs list the interrogatory and relevant portion of  
 5 the response at issue below. Plaintiffs respectfully request that the Court grant their motion, order  
 6 Ancestry to fully answer Interrogatory No. 12, and order Ancestry to pay Plaintiffs’ costs in  
 7 moving to compel under Rule 37(a)(5).

### 8 **INTRODUCTION**

9 Previously, the Court largely granted a motion to compel when Ancestry refused to produce  
 10 documents relating to its collection of Plaintiffs’ and Class members’ personal information and  
 11 yearbook photographs, improper use of that information for commercial purposes without consent,  
 12 and Ancestry’s revenue associated with the use of that misappropriated information. *See* Doc. 82.  
 13 Continuing with its established pattern of evasiveness, Ancestry now refuses to fully answer  
 14 Interrogatory No. 12, which, among other information, seeks the date that each Nevada yearbook  
 15 was uploaded to the Ancestry Yearbook Database. Ancestry has, in turn, maintained that the date  
 16 of upload is either (1) irrelevant, or (2) relevant yet overly burdensome to identify. However, this  
 17 information is not only highly relevant to Plaintiffs’ discovery into Ancestry’s affirmative  
 18 defenses, but is also “proportional to the needs of the case.” Fed. R. Civ. P. 26.

19 First, Ancestry has asserted several affirmative defenses which hinge upon the timing of  
 20 when yearbooks were uploaded to Ancestry. To suggest that evidence related to those affirmative  
 21 defenses is irrelevant is untenable. Plaintiffs expect that Ancestry will claim the requested  
 22 information is irrelevant because Plaintiffs’ class definition is not limited to individuals appearing  
 23 in Nevada yearbooks, but the fact that Plaintiffs have agreed to limit this discovery request to  
 24 Nevada yearbooks rather than all yearbooks that appear on ancestry.com should not preclude them  
 25 from gathering this clearly relevant information.

26 Second, Ancestry also asserts that the requested information is overly burdensome for it to  
 27 produce, but this contention is belied by the fact that Ancestry acknowledges that it could identify

1 when each of the Plaintiffs' yearbook records were added to the website. Moreover, Ancestry has  
 2 not articulated the burden it would suffer were it to gather responsive information, or at least the  
 3 best information available to it in a reasonable search.

4 Plaintiffs move to compel Ancestry to fully respond to Interrogatory No. 12, as Ancestry  
 5 cannot carry its "'heavy burden' of demonstrating why discovery should be denied." *F.T.C. v.*  
 6 *AMG Servs., Inc.*, No. 212-CV-536-GMN-VCF, 2015 WL 176417, at \*2 (D. Nev. Jan. 14, 2015).

### 7 **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

8 Plaintiffs sued Ancestry because it misuses people's names and faces to advertise its  
 9 subscriptions—all without their permission. Ancestry publishes an online database of information  
 10 from school yearbooks, what it calls the "U.S., School Yearbooks, 1900-1999" database. Doc. 1  
 11 ("Compl.") ¶ 3. To do so, it collects the yearbooks from unknown sources and then extracts  
 12 people's names, faces, and details to store that information in its database. *Id.* Over time, Ancestry  
 13 has amassed over 1.7 million records on Nevadans alone. *Id.* It then sells access to their  
 14 information for profit through its online subscriptions using the yearbook images from its database  
 15 as part of its onsite advertising to solicit website users to purchase subscriptions. *Id.* ¶¶ 8-12.

16 Ancestry never sought Plaintiffs' or Class members' consent to collect their information,  
 17 never notified them that their information would be used in advertising, and never compensated  
 18 them for the same. *Id.* ¶ 4. These actions violate Nev. Rev. Stat. §§ 579.770 *et seq.* because  
 19 Ancestry misappropriated Plaintiffs' and Class members' names and likenesses for a "commercial  
 20 use." *Id.* ¶¶ 68-74.

21 In September 2021, the Court denied Ancestry's motion to dismiss Plaintiffs' publicity  
 22 claim and motion to strike their complaint under the anti-SLAPP statute. *See* Doc. 36. Ancestry  
 23 then answered Plaintiffs' complaint, asserting 30 affirmative defenses, including: laches, waiver,  
 24 statute of limitations, failure to mitigate, waiver, and ratification. *See* Doc. 38. As described more  
 25 fully below, each of these defenses is predicated upon the Plaintiffs' and Class members' purported  
 26 delay in bringing these claims against Ancestry. Accordingly, the yearbook upload dates sought  
 27 in Interrogatory No. 12 are directly relevant to those defenses.

1           On June 6, 2022, Plaintiffs served Interrogatories on Ancestry. Ram Decl., Exhibit 1, at ¶  
2       3. Plaintiffs' Interrogatories were tailored to the claims raised in the Complaint and Ancestry's  
3       affirmative defenses, targeting only information related to Ancestry's liability and the Class's  
4       damages. *Id.* Ancestry initially responded to Plaintiffs' Interrogatories on July 25, 2022. Ram Decl.  
5       ¶ 4. In response to Interrogatory No. 12, Ancestry objected based on breadth and burden, that it  
6       was duplicative of other discovery request, and that it sought information not in Ancestry's  
7       possession, custody, or control, and refused to provide a response, instead offering to meet and  
8       confer with Plaintiffs. *Id.*, Ex. A. Plaintiffs sent a letter to Ancestry on August 11, 2022, regarding  
9       Ancestry's interrogatory responses and, with respect to Interrogatory No. 12, challenged  
10      Ancestry's burden objection, which was provided without any detail as to what burden Ancestry  
11      would suffer, noted that the request sought relevant information regarding Ancestry's affirmative  
12      defenses, and invited Ancestry to meet and confer about this response. *Id.*, Ex. B. Ancestry  
13      proceeded to ignore Plaintiffs' attempts to meet and confer for more than a month, with Ancestry  
14      finally agreeing to hold a telephone conference on September 20, 2022. *Id.*, Ex. F (R. Borrelli  
15      email to J. Baumann, 9/12/22). In advance of that telephone conference, Ancestry responded to  
16      Plaintiffs' August 11 letter and, with respect to Interrogatory No. 12, stated that it would "amend  
17      its responses and objections to this Interrogatory to provide certain information within its  
18      possession, custody, and control, and to explain what information it cannot provide." *Id.*, Ex. C.  
19      When the parties met by telephone on September 20, Plaintiffs clarified that, for Interrogatory No.  
20      12, they wanted Ancestry to identify information about when each Nevada yearbook on  
21      ancestry.com was uploaded to the website, if that information is available. *Id.*, Ex. F (R. Borrelli  
22      email to J. Baumann, 9/20/22). Ancestry indicated that it would assess whether it could provide  
23      that information. *Id.* (C. Henriquez email to R. Borrelli, 9/20/22). Plaintiffs had not yet received  
24      Ancestry's supplemental response to Interrogatory No. 12 when it took the Rule 30(b)(6) and  
25      30(b)(1) deposition of Ancestry's corporate designee, Todd Godfrey, on October 5, 2022. *Id.*, ¶ 5.

26           Finally, on October 25, 2022, Ancestry produced its supplemental responses and objections  
27      to Interrogatory No. 12, refusing to provide the upload date for each Nevada yearbook identified  
28

1 in its response. Plaintiffs list Interrogatory No. 12 and Ancestry's supplemental response thereto  
 2 below pursuant to Local Rule 26-6.

3 **PLAINTIFFS' INTERROGATORY NO. 12:**

4 "Identify all yearbooks in the Yearbook Database from schools in Nevada  
 5 and the date on which each such yearbook was added to the Yearbook Database.  
 6 Yearbooks should be identified by at least the following information: name of  
 7 school; location of school within Nevada (city and county); year of yearbook  
 8 publication; and date (day, month, and year) on which the yearbook was added to  
 9 the Yearbook Database.

10 **ANCESTRY'S SUPPLEMENTAL RESPONSE TO INTERROGATORY**  
 11 **NO. 12:**

12 Ancestry incorporates its general objections and in addition objects to this  
 13 Interrogatory on the grounds that it: (i) is overly broad and unduly burdensome,  
 14 including to the extent it seeks information that is neither relevant to the claims or  
 15 defenses of any party nor proportional to the needs of the case, including because  
 16 it is not limited to an appropriate temporal scope; (ii) is duplicative of other  
 17 discovery in this action; and (iii) seeks information that is outside of Ancestry's  
 18 possession, custody, or control, to the extent this information is not known or not  
 19 capable of being accurately determined without undue burden and expense.

20 The below table lists the name of the school, year the yearbook was  
 21 published, and school city for each Nevada yearbook in Ancestry's Yearbook  
 22 Database. It does not list the county of the school because that is not something  
 23 Ancestry tracks and it is something that is as accessible to plaintiffs as it is to  
 24 Ancestry, so it would be unduly burdensome for Ancestry to take on the burden and  
 25 expense of determining that irrelevant information for each yearbook within the  
 26 database.

27 In addition, Ancestry objects to providing the yearbook upload date of each  
 28 Nevada yearbook. Ancestry does not track yearbook record launches at the  
 individual yearbook or yearbook record level, but rather tracks them at a  
 "collection" level instead. So identifying the publication date for a given yearbook  
 or yearbook record requires Ancestry to link that record back to a "collection" and  
 determine the date the collection was uploaded or last updated. For some yearbooks  
 and yearbook records, this information is more readily available than it is for others,  
 depending on the collection the record or yearbook is a part of. While Ancestry  
 might be able to identify dates when yearbook collections were updated, it might  
 not be able to determine what new uploads were contained in each of those updates.  
 The yearbooks collection has been updated several times since its original release  
 in 2010. The earlier releases were completed using multiple toolsets and processes  
 that have been replaced and are no longer supported. Although some of the  
 underlying information is still available, it would require significant manual work

1 to review what data is still available and attempt to determine individual yearbook  
2 or record upload dates. In addition, this might not always be possible.

3 There are backups of yearbook collection launches that would need to be  
4 restored and meticulously reviewed to attempt to match a yearbook or yearbook  
5 record with any specific launch. Even then, not every launch has a backup, so not  
6 all the launch information can be restored and reviewed. Moreover, some yearbooks  
7 were released in phases. Sometimes, yearbook records within the same yearbook  
8 were released in various launches and it could be impossible to fully track and  
9 report which records were released in which launch. And certain yearbooks were  
10 reprocessed under different identifiers.

11 Determining the yearbook upload date for each yearbook or yearbook  
12 record from Nevada would require extensive manual review, and in some cases, it  
13 will be impossible to fully track down because that data might not be available.<sup>1</sup>

14 Plaintiffs have made significant efforts to resolve this dispute without court intervention.  
15 Between October 25, 2022, and November 4, 2022, Plaintiffs met and conferred with Ancestry  
16 multiple times via letter, telephone, and email about its supplemental responses and objections to  
17 Interrogatory No. 12. Ram Decl. ¶ 8, Ex. D. Specifically, Plaintiffs took issue with Ancestry's  
18 refusal to produce the requested information (despite its acknowledgement that such information  
19 is available), while simultaneously asserting a statute of limitations defense. *Id.* In fact, as Plaintiffs  
20 pointed out to Ancestry, its own website identifies when groups of yearbook records were added  
21 to the website. *Id.*, Ex. G (screenshot). Yet, Ancestry continued to suggest that yearbook records  
22 (as opposed to yearbooks as a whole) are parts of various "collections" that are uploaded in groups,  
23 and that it cannot identify what records are part of what collection without investigation into each  
24 individual record. *Id.*, Ex. D.

25 Not only is this explanation implausible, but Ancestry has also blocked Plaintiffs' attempts  
26 to investigate it further. Because the supplemental response to Interrogatory No. 12 was not served  
27 until after Mr. Godfrey's deposition, Plaintiffs were unable to ask Mr. Godfrey about the limited

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28 <sup>1</sup> Ancestry's supplemental response also includes a 30-page table containing the "Year of  
Yearbook Publication," "School Name," and "School City" of a limited number of schools.

1 response to Interrogatory No. 12 (since Plaintiffs did not have it yet) and are now lacking testimony  
2 regarding how Ancestry tracks when yearbooks and/or yearbook records are added to ancestry.com  
3 that would substantiate Ancestry's objections to responding to this request. *Id.* Hoping to avoid a  
4 motion to compel, Plaintiffs offered to re-open the Rule 30(b)(6) deposition of Mr. Godfrey so  
5 they could obtain the testimony necessary to fully explore this topic. Ancestry refused. *Id.*

6 However, while Ancestry agreed to provide upload dates for the seven yearbooks directly  
7 related to the named Plaintiffs, it continues to refuse to provide the dates on which all other Nevada  
8 yearbooks were added to the database. *Id.* Plaintiffs maintain that the entirety of the requested  
9 information is relevant and necessary because Ancestry has asserted defenses which hinge upon  
10 Plaintiffs' and the Class's purported delay in taking action to protect their rights, making the upload  
11 dates critical. And, because it appears Ancestry can identify this information based on its offer to  
12 provide it for the named Plaintiffs, it has failed to substantiate its vague claim of burden. The Court  
13 should order Ancestry to produce the upload date for each Nevada yearbook, or, at a minimum, its  
14 best estimate as to when each yearbook was uploaded.  
15

## 16 LEGAL STANDARD

17  
18 "[B]road discretion is vested in the trial court to permit or deny discovery." *Hallett v.*  
19 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S. 574, 598,  
20 (1998). Discovery is limited to any nonprivileged matter that is relevant to any party's claim or  
21 defense and is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).  
22

23 Nonetheless, a party may seek an order compelling the opposing party to provide discovery  
24 if they are unable to come to an amicable resolution of their dispute. Fed. R. Civ. P. 37(a)(1); *see*  
25 *also Big City Dynasty v. FP Holdings, L.P.*, 336 F.R.D. 507, 510 (D. Nev. 2020). The responding  
26 party must carry a "heavy burden" to avoid discovery: "It has long been clear that the party  
27 resisting discovery bears a heavy burden of showing why that discovery should be denied." *V5*  
28

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1 *Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019), *aff'd sub nom. V5 Techs., LLC v.*  
 2 *Switch, LTD.*, No. 2:17-CV-2349-KJD-NJK, 2020 WL 1042515 (D. Nev. Mar. 3, 2020). Courts  
 3 base this burden on the “liberal discovery principles of the Federal Rules.” *Blankenship v. Hearst*  
 4 *Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The party resisting discovery can only meet this burden  
 5 by “specifically detailing” why they cannot respond: “Succinctly stated, the party opposing  
 6 discovery bears the burden of showing the disputed discovery is not relevant, a burden that is met  
 7 by specifically detailing the reasons why each request is irrelevant.” *V5 Techs.*, 334 F.R.D. at 310.  
 8 And they must do so in two steps by alleging: “(1) specific facts, which indicate the nature and  
 9 extent of the burden, usually by affidavit or other reliable evidence, or (2) sufficient detail  
 10 regarding the time, money and procedures required to comply with the purportedly improper  
 11 request.” *U.S. ex rel. Fiederer v. Healing Hearts Home Care, Inc.*, No. 2:13-CV-1848-APG-VCF,  
 12 2014 WL 4666531, at \*3 (D. Nev. Sept. 18, 2014).

14 Moreover, if the Court grants a motion under Rule 37, it “must” order the party resisting  
 15 discovery to pay the moving party’s expenses. Fed. R. Civ. P. 37 (“the court must, after giving an  
 16 opportunity to be heard, require the party or deponent whose conduct necessitated the motion[...]  
 17 to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s  
 18 fees.”). The resisting party may avoid paying those costs only if the Court finds that the parties did  
 19 not meet and confer in “good faith,” the party resisting discovery was “substantially justified,” or  
 20 “other circumstances make an award of expenses unjust.” *Id.* A party is “substantially justified” in  
 21 resisting discovery only if it “has shown that there is a genuine dispute or that reasonable people  
 22 could differ as to the appropriateness of the contested action.” *Aevoe Corp. v. AE Tech Co.*, No.  
 23 2:12-CV-00053-GMN, 2013 WL 5324787, at \*2 (D. Nev. Sept. 20, 2013). And the burden is on  
 24 the losing party to justify its conduct. *American Gen. Life Ins. Co. v. Futrell*, 2012 WL 4962997,  
 25  
 26  
 27  
 28



at \*1 (D. Nev. Oct.16, 2012). (“The burden is on the losing party to affirmatively demonstrate that its discovery conduct was substantially justified.”).

### **ARGUMENT**

#### **A. The dates on which Ancestry added the Nevada Yearbooks to its Yearbooks Database are relevant to the claims and defenses raised in this case.**

The Court should compel Ancestry to provide the dates on which it added the Nevada Yearbooks to its Yearbook Database because this information is relevant to Plaintiffs’ claims and Ancestry’s defenses. District courts enjoy wide discretion in deciding relevancy for discovery purposes. *Shaw v. Experian Info. Solutions, Inc.*, 306 F.R.D. 293, 296 (S.D. Cal. 2015). To be permissible, discovery must be merely “relevant to any party’s claim or defense.” *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 563-64 (D. Ariz. 2016) (discussing impact of 2015 amendments to definition of relevance for discovery purposes). Relevance for the purposes of discovery is defined broadly. *See Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998); *see also Fed. Nat’l Mortg. Ass’n v. SFR Invs. Pool I, LLC*, Case No. 2:14-cv-02046-JAD-PAL, 2016 WL 778368, at \*2 n.16 (D. Nev. Feb. 25, 2016) (finding the scope of relevance remains broad even after 2015 amendments). Courts routinely reject relevance objections when the information sought bears on plaintiff’s ability to prove her claim. *Chasson-Forrest v. Cox Comms. Las Vegas, Inc.*, 2017 WL 1328370, at \*1 (Nev. App. Mar. 31, 2017).

By way of illustration, Ancestry has asserted the following affirmative defenses, all of which are based upon Plaintiffs’ and Class members’ purported delays and lack of timely action. These affirmative defenses include Laches, Waiver, Statutes of Limitations, Failure to Mitigate Damages, Waiver and Release, and Ratification. Doc. 38, ¶¶100, 101, 104, 105, 106, 116.

Each of these defenses turns on the dates when the Plaintiffs’ and Class members’ yearbooks were first available for viewing on ancestry.com. Plaintiffs expect that the statute of limitations may become an issue in this case based on Ancestry’s position in a related case, *Bonilla v. Ancestry.com Operations Inc.*, No. 20 C 7390, 2022 WL 4291359, at \*1 (N.D. Ill. Sept. 16, 2022). There, Ancestry argued that the plaintiff’s yearbook photographs had been added to

ancestry.com more than one year before plaintiff filed his case, and thus outside of the one year statute of limitations provided by the Illinois Right of Publicity Act. *Id.*, at \*3. The court agreed and dismissed the plaintiff's claims. *Id.*, at \*5. Although Plaintiffs disagree with the analysis and result of the *Bonilla* case and are confident that a statute of limitations defense would be unsuccessful here,<sup>2</sup> Plaintiffs are entitled to discovery on this issue to respond to this affirmative defense.

Similarly, to establish laches, a party must demonstrate "(1) that the opposing party lacked diligence in pursuing its claim; and (2) that prejudice resulted from that lack of diligence." *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012).<sup>1</sup> The doctrine of laches "derives from the maxim that a party who sleeps on his rights loses his rights," and is equivalent to the doctrine of waiver. *Id.* For both defenses, as well as Ancestry's "waiver and release" defense, the dates on which the yearbooks were uploaded are relevant to showing Plaintiffs did not delay in bringing their claims. Finally, the analysis of Ancestry's "Failure to Mitigate Damages" and "Ratification" defenses hinges, in part, on how much time claimants had to take action regarding the alleged conduct. Ostensibly, if enough time passed, that may show claimants failed to mitigate damages or that they "ratify[ed] . . . acquiesc[ed] or consent[ed] to Ancestry's alleged conduct."

Despite the clear relevance of the requested information, Ancestry asserts that the request is irrelevant because it seeks information about yearbooks that may not contain records of putative class members. However, this objection ignores that Plaintiffs agreed to limit a number of their discovery requests in this case to Nevada yearbooks to address this very objection. Ram Decl., ¶ 6. Ancestry cannot now claim that the agreed-upon scope limitation is still not enough.

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<sup>2</sup> See, e.g., *Brown v. Tromba*, 2:17-cv-02396-APG-BNW, 2022 WL 206106, at \*3 (D. Nev. Jan. 24, 2022) ("Under Nevada's discovery rule, time limits generally 'do not commence and the cause of action does not 'accrue' until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the damage or injury.") (quoting *G & H Assocs. v. Ernest W. Hahn, Inc.*, 934 P.2d 229, 233 (Nev. 1997)); *Raymond G. Schreiber Revocable Trust v. Estate of Knievel*, 984 F. Supp. 2d 1099, 1111 (D. Nev. 2013) ("Nevada follows the discovery rule, that is, a claim accrues when a claimant knows or should have known the facts giving rise to the claims for relief.").

1           Given the relevance of the requested information to the claims and defenses raise in this  
2 case, Plaintiffs' motion to compel should be granted.

3           **B. Plaintiffs' discovery request is not burdensome.**

4           Despite the relevance of Interrogatory No. 12, Ancestry asserts that obtaining the requested  
5 information would be "unduly burdensome" and objects on that basis as well. Considering the  
6 Court's broad latitude in making these determinations and given the clear relevance of the upload  
7 dates to the claims and defenses at issue, Ancestry's burden objection should be overruled.

8           Ancestry cannot carry the "heavy burden of showing why [] discovery should be denied,"  
9 *V5 Techs.*, 334 F.R.D. at 309, and cannot show that the burden of providing the requested  
10 information "outweighs its likely benefit," Fed. R. Civ. P. 26; *see also Carreon v. Smith's Food &*  
11 *Drug Stores*, No. 2:18-CV-01933-APG-NJK, 2019 WL 13210889, at \*2 (D. Nev. Feb. 26, 2019)  
12 ("[T]he moving party bears the burden of showing 'good cause' by demonstrating harm or  
13 prejudice that will result from the discovery."). As discussed above, the information is highly  
14 relevant. Thus, Ancestry must affirmatively show, with evidence, why responding to the request  
15 would be overly burdensome. To date, Ancestry has simply claimed that it would take "hundreds  
16 of hours to track down this information for the 2,654,270 Nevada yearbook records for which you  
17 seek the information." Ram Decl., Ex. D (C. Henriquez email to R. Borrelli, 11/1/22). But  
18 Plaintiffs do not seek this information on a record-by-record basis, but rather on a yearbook-by-  
19 yearbook basis. For example, if records in a specific yearbook were added to the website in 2018  
20 and 2019, the interrogatory response should provide that information. Ancestry's attempt to  
21 manufacture a burden by focusing on the individual records in each Nevada yearbook misses the  
22 mark and attempts to answer a question that Interrogatory No. 12 does not ask.

23           The facts and arguments presented here are similar to those in *Donnelly v. NCO Financial*  
24 *Systems, Inc.*, 263 F.R.D. 500, 503 (N.D. Ill. 2009), a TCPA case where the "Plaintiff issued  
25 several discovery requests aimed at learning the basis for defendant's prior express consent  
26 defense." The *Donnelly* plaintiff requested that defendant produce "a list of all persons it called on  
27 cellular telephones with area code 312 or 773 and using a predictive dialer or automatic voice,

1 since August 19, 2008.” *Id.* at 503. Much like Ancestry argues that identifying the requested upload  
 2 dates would be burdensome and time-consuming, the defendant in *Donnelly* similarly argued that  
 3 it “would be unduly burdensome to produce this information” and argued:

4 “What we are dealing with here, [Y]our Honor, is over 100 million telephone calls.  
 5 And it would require an analysis of all that data to establish many things; first of  
 6 all, when the calls were placed, whether or not the calls were placed to the  
 7 geographic location that's involved in the class, [omitting two other criterion], and  
 then whether or not the calls that were placed are tied to an account that we could  
 then identify so we have a class representative.”

8 *Id.* at 502-503. The *Donnelly* court found in favor of the plaintiff, granting the motion to  
 9 compel, and requiring defendant to produce class-wide documentation and information relating to  
 10 its prior express consent defense, even if it required defendant to create special programs to extract  
 11 such information and even if compiling it would take “several hundred hours.” *Id.* at 503. The  
 12 *Donnelly* court found that because the likely benefit of such material outweighed any burden and  
 13 expense of producing it, the motion to compel should be granted. *Id.* at 504.

14 The facts here are similar as those in *Donnelly*. Ancestry objects to Plaintiffs’ request for  
 15 information that is relevant to several of Ancestry’s affirmative defenses, arguing that it would be  
 16 difficult, time consuming, and expensive for Ancestry to procure. However, since the analysis  
 17 necessary to gather the information can be done,<sup>3</sup> and the value of information outweighs the  
 18 burden of generating it, Plaintiffs’ motion to compel should be granted. *See Argento v. Sylvania*  
 19 *Lighting Servs. Corp.*, No. 2:15-CV-01277-JAD-NJK, 2015 WL 4918065, at \*5 (D. Nev. Aug. 18,  
 20 2015) (In considering an “undue burden” argument, courts generally evaluate whether “the burden  
 21 or expense of the proposed discovery outweighs its likely benefit, considering the needs of the  
 22 case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the  
 23 action, and the importance of the discovery in resolving those issues.”). And Plaintiffs remain  
 24 willing to meet and confer about the scope of the information available on a yearbook-by-yearbook  
 25

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26 <sup>3</sup> Ancestry has shown that it is able to retrieve the requested information when it chooses  
 27 to do so, as demonstrated by its offer to produce dates for the seven yearbooks associated with the  
 named Plaintiffs. Ram Decl. ¶ 8, Ex. D.

1 basis (as opposed to a record-by-record basis) or to reopen the deposition of Mr. Godfrey to explore  
2 the basis for Ancestry's burden objection.

3 In sum, Plaintiffs' Motion to Compel should be granted.

4 **C. The Court should order Ancestry to pay Plaintiffs' expenses and fees under Rule 37.**

5 As noted above, the governing rules provide a presumption that reasonable expenses—  
6 including attorneys' fees—will be awarded to the party that prevails on a motion to compel  
7 discovery. Fed. R. Civ. P. 37(a)(5)(A); *see also Big City Dynasty*, 336 F.R.D. at 513. The losing  
8 party may rebut the presumption of an award of expenses by establishing that its position was  
9 “substantially justified.” Fed. R. Civ. P. 37(a)(5)(A)(ii). A position is substantially justified when  
10 “the parties had a genuine dispute on matters on which reasonable people could differ as to the  
11 appropriate outcome.” *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 609 (D. Nev. 2016) (citing  
12 *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The party facing an award of expenses bears the  
13 burden of establishing substantial justification. *Nationstar Mortgage, LLC v. Flamingo Trails*, 316  
14 F.R.D. 327, 335 (D. Nev. 2016). District courts have “great latitude” in awarding expenses under  
15 Rule 37. *Lew v. Kona Hosp.*, 754 F.2d 1420, 1425 (9th Cir. 1985).

16 The Court should order Ancestry to pay Plaintiffs' expenses and fees spent filing this  
17 motion because Ancestry's discovery misconduct is not “substantially justified.” Fed. R. Civ.  
18 P. 37. Plaintiffs' Interrogatory No. 12 requested information that informs both the Plaintiffs'  
19 claims and Ancestry's defenses and accordingly, “reasonable people” would agree that the  
20 requested information is necessary to evaluate Ancestry's defenses and not unduly burdensome to  
21 produce. Thus, the Court should grant Plaintiffs' Motion and order Ancestry to pay their expenses  
22 and fees.

23 **CONCLUSION**

24 For the above reasons, Plaintiffs respectfully request that the Court compel Ancestry to  
25 produce discovery under Rule 37, ordering Ancestry to:

- 26 A. Fully respond to Plaintiffs' Interrogatory No. 12, including the identification of dates on  
27 which it added or uploaded the Nevada Yearbooks to its Yearbooks Database;

- 1 B. Pay Plaintiffs' fees and costs in moving to compel this information under Rule 37; and  
2 C. Any such further relief as the Court deems just and equitable.

3 DATED: November 11, 2022.

Respectfully Submitted by,

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30 *ANTHONY SESSA; and MARK SESSA, on*  
31 *behalf of themselves and all others similarly*  
32 *situated*

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b)(2)(e), I hereby certify that on this day, I caused a true and correct copy of the foregoing **PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' RESPONSE TO INTERROGATORY NO. 12 AND MEMORANDUM IN SUPPORT** to be served via the Court's electronic system on all registered and active parties.

/s/ Lucille Chiusano

An employee of Law Offices of Miles N. Clark, LLC

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